2005

Debra Meenderink v. Steven Meenderink : Reply Brief

Utah Court of Appeals

Catherine S. Conklin; Farr, Kaufman, Sullivan, Jensen, Medsker, Conklin, Olds & Nichols; Attorney for Petitioner/Appellee.
Catherine F. Labatte; Attorney for Respondent/Appellant.

IN THE UTAH COURT OF APPEALS

DEBRA MEENDERINK, Petitioner/Appellee, vs. STEVEN MEENDERINK, Respondent /Appellant.	Appeal No. 20050466

REPLY OF APPELLANT

This is an appeal from a final judgment of the Second District Court, Weber County, State of Utah, the Honorable Roger S. Dutson presiding.

CATHERINE F. LABATTE, #6763
ATTORNEY FOR RESPONDENT/APPELLANT
500 NORTH MARKETPLACE DRIVE, SUITE 201
P.O. BOX 159
CENTERVILLE, UTAH 84014
TELEPHONE: (801) 294-7777
FACSIMILE: (801) 294-7787

CATHERINE S. CONKLIN
FARR, KAUFMAN, SULLIVAN, JENSEN
MEDSKER, CONKLIN, OLDS & NICHOLS
ATTORNEYS FOR PETITIONER/APPELLEE
205 26th Street, Suite 34
Ogden, UT 84401

Oral argument is requested.

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Respondent, Appellant Steven Meenderink "Steven" submits this Reply brief pursuant to the Utah Rules of Appellate Procedure.

DETERMINATIVE RULES AND STATUTES

State Statutes

Utah Code Ann. 78-45-7.Determination of amount of support -- Rebuttable guidelines.
(1) (a) Prospective support shall be equal to the amount granted by prior court order unless there has been a substantial change of circumstance on the part of the obligor or obligee or adjustment under Subsection 78-45-7.2(6) has been made.
(b) If the prior court order contains a stipulated provision for the automatic adjustment for prospective support, the prospective support shall be the amount as stated in the order, without a showing of a material change of circumstances, if the stipulated provision:
(I) is clear and unambiguous;
(ii) is self-executing;
(iii) provides for support which equals or exceeds the base child support award required by the guidelines; and
(iv) does not allow a decrease in support as a result of the obligor's voluntary reduction of income.
(2) If no prior court order exists, a substantial change in circumstances has occurred, or a petition to modify an order under Subsection 78-45-7.2(6) has been filed, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.
(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors, including but not limited to:

(a) the standard of living and situation of the parties;
(b) the relative wealth and income of the parties;
©) the ability of the obligor to earn;
(d) the ability of the obligee to earn;
(e) the ability of an incapacitated adult child to earn, or other benefits received by the adult child or on the adult child's behalf including Supplemental Security Income;
(f) the needs of the obligee, the obligor, and the child;
(g) the ages of the parties; and
(h) the responsibilities of the obligor and the obligee for the support of others.
(4) When no prior court order exists, the court shall determine and assess all arrearages based upon the Uniform Child Support Guidelines described in this chapter.
Amended by Chapter 53, 1998 General Session

Utah Code Ann. 78-45-7.2. Application of guidelines -- Rebuttal.
(1) The guidelines apply to any judicial or administrative order establishing or modifying an award of child support entered on or after July 1, 1989.
(2) (a) The child support guidelines shall be applied as a rebuttable presumption in establishing or modifying the amount of temporary or permanent child support.
(b) The rebuttable presumption means the provisions and considerations required by the guidelines, the award amounts resulting from the application of the guidelines, and the use of worksheets consistent with these guidelines are presumed to be correct, unless rebutted under the provisions of this section.
(3) A written finding or specific finding on the record supporting the conclusion that complying with a provision of the guidelines or ordering an award amount resulting from use of the guidelines would be unjust, inappropriate, or not in the best interest of a child in a particular case is sufficient to rebut the presumption in that case. If an order rebuts the presumption through findings, it is considered a deviated order.
(4) The following shall be considered deviations from the guidelines, if:
(a) the order includes a written finding that it is a nonguidelines order;
(b) the guidelines worksheet has the box checked for a deviation and has an explanation as to the reason; or
©) the deviation was made because there were more children than provided for in the guidelines table.
(5) If the amount in the order and the amount on the guidelines worksheet differ, but the difference is less than $10, the order shall not be considered deviated and the incomes listed on the worksheet may be used in adjusting support for emancipation.
(6) (a) Natural or adoptive children of either parent who live in the home of that parent and are not children in common to both parties may at the option of either party be taken into account under the guidelines in setting or modifying a child support award, as provided in Subsection (7). Credit may not be given if:
(I) by giving credit to the obligor, children for whom a prior support order exists would have their child support reduced; or
(ii) by giving credit to the obligee for a present family, the obligation of the obligor would increase.

(b) Additional worksheets shall be prepared that compute the obligations of the respective parents for the additional children. The obligations shall then be subtracted from the appropriate parent's income before determining the award in the instant case.
(7) In a proceeding to modify an existing award, consideration of natural or adoptive children born after entry of the order and who are not in common to both parties may be applied to mitigate an increase in the award but may not be applied:
(a) for the benefit of the obligee if the credit would increase the support obligation of the obligor from the most recent order; or
(b) for the benefit of the obligor if the amount of support received by the obligee would be decreased from the most recent order.
(8) (a) If a child support order has not been issued or modified within the previous three years, a parent, legal guardian, or the office may petition the court to adjust the amount of a child support order.
(b) Upon receiving a petition under Subsection (8)(a), the court shall, taking into account the best interests of the child, determine whether there is a difference between the amount ordered and the amount that would be required under the guidelines. If there is a difference of 10% or more and the difference is not of a temporary nature, the court shall adjust the amount to that which is provided for in the guidelines.
©) A showing of a substantial change in circumstances is not necessary for an adjustment under Subsection (8)(b).
(9) (a) A parent, legal guardian, or the office may at any time petition the court to adjust the amount of a child support order if there has been a substantial change in circumstances.
(b) For purposes of Subsection (9)(a), a substantial change in circumstances may include:
(I) material changes in custody;
(ii) material changes in the relative wealth or assets of the parties;
(iii) material changes of 30% or more in the income of a parent;
(iv) material changes in the ability of a parent to earn;
(v) material changes in the medical needs of the child; and
(vi) material changes in the legal responsibilities of either parent for the support of others.
©) Upon receiving a petition under Subsection (9)(a), the court shall, taking into account the best interests of the child, determine whether a substantial change has occurred. If it has, the court shall then determine whether the change results in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the guidelines. If there is such a difference and the difference is not of a temporary nature, the court shall adjust the amount of child support ordered to that which is provided for in the guidelines.
(10) Notice of the opportunity to adjust a support order under Subsections (8) and (9) shall be included in each child support order issued or modified after July 1, 1997.

Amended by Chapter 176, 2003 General Session

78-45-7.5 Determination of gross income -- Imputed income.

(1) As used in the guidelines, "gross income" includes:

(a) prospective income from any source, including nonearned sources, except under Subsection (3); and

(b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, income replacement disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. However, if and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at his job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

(3) Specifically excluded from gross income are:

(a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program;

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, Medicaid, Food Stamps, or General Assistance; and

©) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Department of Workforce Services may be substituted for pay stubs, employer statements, and income tax returns.

©) Historical and current earnings shall be used to determine whether an

underemployment or overemployment situation exists.

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the party defaults, or, in contested cases, a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

©) If a parent has no recent work history or their occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist:

(I) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a minor child who is the subject of a child support award nor benefits to a minor child in the child's own right such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

78-45-7.7. Calculation of obligations.

(1) Each parent's child support obligation shall be established in proportion to their adjusted gross incomes, unless the low income table is applicable. Except during periods of court-ordered parent-time as set forth in Section 78-45-7.11, the parents are obligated to pay their proportionate shares of the base combined child support

obligation. . . .
(2) Except in cases of joint physical custody and split custody as defined in Section 8-45-2 and in cases where the obligor's adjusted gross income is $1,050 or less monthly, the base child support award shall be determined as follows:
(a) combine the adjusted gross incomes of the parents and determine the base combined child support obligation using the base combined child support obligation table; and
(b) calculate each parent's proportionate share of the base combined child support obligation by multiplying the combined child support obligation by each parent's percentage of combined adjusted gross income.

DISPUTE OF APPELLEE'S STATEMENT OF THE CASE

1. Petitioner/Appellee "Debra" has suggested that Steven behaved in dilatory behavior such as changing counsel, and asking for continuances, thereby validating the court's decisions regarding child support and attorney fees. More correctly, Steven's previous counsel withdrew, both for financial reasons. Once Steven again had counsel, Steven requested additional time to secure a medical and vocational expert. (R264) Debra brought no experts to trial. Steven promptly proceeded to trial once he had again retained counsel.

2. Steven did not request a second continuance, (Appellee's Brief page 7) but rather an additional setting for the one day trial so that the vocational expert could testify. The phone conference cited in the record at R300-301 was related to the Social Security Administration filing a Motion to Quash the subpoena for Joleen Wyler, an employee of the Social Security Administration"SSA," who had worked with Steve on his eligibility for benefits. (R300-301) The response of the SSA was not within Steven's control, and Judge Dutson made serious, but unsuccessful efforts to compel the testimony. (R306-307) Steven cooperated in every manner with this effort.

DISPUTE OF PETITIONER'S STATEMENT OF FACTS

1. Steven's Petition to Modify the Decree of Divorce was filed on July 13, 2001.

2. Although Steven was receiving Social Security Disability ("SSDI") at the time of the divorce, that income was subsequently found by the Social Security Administration ("SSA") to be an error and overpayment. The disability payments were discontinued shortly after entry of the Decree. Due to a delay between Steven resuming work and the SSA ceasing the payments, Steven was subject to Social Security recoupment. Even at the time of trial Steven was repaying the overpayment, thereby reducing his benefits. (T185) At the time of the divorce, by the parties' agreement, Steven was actually receiving the children's payments as their representative payee. (T157).

3. Debra implies that Steven acknowledged that he did not give any of the SSDI money to Debra and that he only paid child support "when he could." (Appellee's Brief 9) Steven's evidence demonstrated that during the year 2000 he paid $4,830 directly to Debra in addition to the SSDI she received. (Exhibit R13) Steven actually explained, "I had worked for about three months from October (1999) to January 10th (2000). And I made child support payments to her at that point. From April of 1999 to September of 1999 I made child support payments to her out of the unemployment income that I got. And there were other times when, for example, when my Grandmother would give me a hundred bucks, I would give her half of it. And I had got some short term disability checks from Discover Card, their insurance company and I gave her half of those as well. " (T42-43)

4. By the time Debra returned to work in the year 2000, the children were all in

school full time, and there was no necessity for Debra to remain at home all day.

5. Dr. Joseph Ottowicz, did not testify that Steven "should have no restrictions for any type of office work," but rather that he did not have "significant restrictions" on sedentary type activities. He was found to have intact function from the waist up, and would not have limiting restrictions to lift or carry objects from a sitting position. (T112-113) However, he had limitations on walking and carrying objects due to balancing problems. (T113)

6. Steven testified that he attended a family wave running party once per year, and that he attended dances but simply stands and leans. (T159).

7. Steven's participation at the gym was felt by Dr. Ottowicz to be necessary to maintain his present level of function. (T119-120).

8. Ramona Snell, a Rehabilitation Counselor employed through the State of Utah testified that her role was to find "suitable employment" because "he would stay with it longer if he is satisfied with it." (T145) She indicated Steven was cooperative, wanted to work and she believed he would have taken a job if they had found one for him. (T145).

9. While Steven did keep a portion of his personal injury settlement check, the settlement agreement from his automobile accident included a payment to Debra of $4350 which was to be credited toward child support. (Exhibit R13, A12)

10. Debra's evidence claiming child support arrearage at time of trial did not credit SSDI payments, included interest, and included arrearage beginning April 1999. (Exhibit P2-7) Steven provided a written agreement between the parties, that he was

fully paid through May 15, 1999. (Exhibit R14)

11. Debra's evidence, Exhibit P 2-7 showing arrearage of $13,825 at the time of trial was disputed, by Steven and his exhibits. (R13 B1-55) The Court failed to make a ruling on this dispute.

ARGUMENT - REPLY TO APPELLEE'S ARGUMENTS

Point I. THE COURT EXCEEDED ITS DISCRETION IN RULING THAT THE CHILDREN'S SOCIAL SECURITY PAYMENTS, SHOULD NOT BE CREDITED AGAINST STEVEN'S CHILD SUPPORT OBLIGATION, PARTICULARLY IN ADDITION TO ANY CHILD SUPPORT PAID.

Steven recognized that the trial Court is accorded discretion in certain factors related to a petition to modify child support. Accordingly, Steven accepted the Court's determination that he could work, and did not appeal that decision. Thereby, under the current Court's order, the children are to receive $884 per month as child support effective September 1, 2004. The children were receiving $672 per month Social Security Disability Insurance ("SSDI") at the time of trial.

However, it should be of no consequence to the court or Debra Meenderink whether the funds received by the children are paid partially from their dependant's Social Security Disability Insurance checks and the remainder supplemented through Steven's personal funds earned through employment or his separate Social Security Disability Insurance check. Debra has complained that "Steven is not responsible for his children" (Appellee's Brief 15, 16) although she has actually received SSDI payments and additional cash payments totaling $45,834.00 over the 52 months which are in

dispute (1999 through April 2004).[1] Because the benefits are derived through Steven's past contributions through employment, "No principled distinction exists between social security benefits and child support payments." Brooks v. Brooks 881 P.2d 955, 962 (Ut. App. 1994). So long as the children receive an amount totaling $884 per month, the court's decision to uphold the amount of child support previously ordered would be accomplished.

The argument that the children should receive $884 in child support benefits in addition to $672 per month from SSDI benefits defeats the purpose of the children's Social Security Disability benefit. The purpose of the children's SSDI dependent benefits payment is to replace support the child loses upon the disability of the wage earner responsible for the child's support, thereby enabling a disabled parent to fulfill his financial obligations to his dependants. Brooks at 962 .

Petitioner's argument that the Court found that "Steven believed he did not have to work as long as he obtained SSDI" (Appellee's Brief page 15) raises the concern that the order was entered for punitive reasons and to force Steven into full time employment even if he were satisfying his child support obligation.

The Utah legislature intended to apply the Social Security Disability benefits in the manner intended under humanitarian goals of the Social Security Act; to assist SSDI recipients who are child support obligors, in meeting their child support obligations. This is accomplished through the dependants' SSDI income which flows to the children

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[1]This averages $954.87 per month; exceeding the $884 monthly child support obligation. (Respondent's Exhibit 13B)

secondary to the earner's efforts. This is in contrast to other tax funded state and federal assistance which is not counted as income to a parent or credited to the obligor's child support obligations under Utah law. Utah Code Ann. 78-45-7.5 (3). There is no reasonable explanation why the children should receive uncredited income, based on their father's disability, in addition to full child support paid from his other resources.

This court has stated:

> Our primary goal in interpreting statutes is to evince the "true intent and purpose of the legislature as expressed through the plain language of the Act." In doing so we seek to render all parts there of relevant and meaningful and accordingly we avoid interpretations that will render portions of a statute superfluous or inoperative.
>
> Johansen v. Johansen 2002 UT App 75, ¶ 7, 45 P.3d 520

Debra relies on the language of §78-45-7.2, ("considering the children's best interests") as justification for the court to rebut the application of the statutory guidelines regarding modification of a Decree. The statute at issue in this matter, §78-45-7.5, while part of the entire Uniform Liability for Child Support Act Utah Code, Title 78 Chapter 45, is contained in a section separate from §78-45-7.2. The pertinent subsection, §78-45-7.5 b, as amended in 1997, specifically replaced the discretionary word "may" with the mandatory word "shall". Under these circumstances, this court must balance its duty to consider the language of §78-45-7.2 in its entirety, with the duty to follow the legislature's intent when it made the particular amendment in §75-45-(8)(b).

"When interpreting a statute we first look to the plain language." Brinkerhoff v. Brinkerhoff, 945 P.2d 113, 116 (Utah Ct. App. 1997). Considering this, there is no plausible reason why the legislature would change the language of §78-45-7.5 (8)(b)

except that it intended for the social security payments to be credited toward the child support obligation in cases where the obligor parent was the source for the funds. Debra's proposed interpretation would render subsection (8)(b) inoperative.

Debra suggests that the court has unfettered discretion in all decisions regarding child support modification, and need never follow the various provisions within the statute and guidelines if it is in the best interests of the child. Debra cites Diener v. Diener, 2004 UT App.314, 98 P.3d 1178, which stated "In qualifying the duties of the trial court, the legislature limited the otherwise mandatory nature of the word "shall" and vested trial courts with a measure of discretion in determining the appropriateness of a petition to modify." Diener at 1182. The court was referring to Utah Code Ann. Section §78-45-7.2.

Although Section §78-45-7.2 discusses the court's "measure of discretion" in determining whether modification of the support order is in the child's best interest, it does not dictate that the discretion controls §78-45-7.5 (8)(b). Section 78-45-7.5, covers determination of income, and section (8)(b) covers how a specific type of income, children's Social Security benefits, should be applied. The statute determines how Social Security benefits derived from a parent shall be credited and then specifically states that "other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case." By specifically signifying that the Social Security benefits "shall" be credited and then discussing how other benefits "may" be considered "depending on the circumstances of each case" it is clear that the legislature intended that the Social Security benefits be consistently credited to the

parent without allowing for the court's discretion.

Crediting the children's payments toward the child support obligation effectuates the intentions of the legislature in amending the subsection (8)(b). Under this scheme, if the child support exceeds the children's SSDI payments, Steven would then need to pay the remainder of support from his other resources.

The issue and applicable statute in Diener was §78-45-7.2. In Diener, although this court recognized the trial court's discretion in determining whether to modify a decree, the appellate court ultimately remanded the case because the trial court had not made the necessary findings to support its decision that modification was not in the best interests of the child. Diener at 1183.

Therefore, although the trial court may have had the discretion to deny Steven's proposed modification of the amount of child support, it exceeded its discretion and misapplied the law in it's ruling regarding application of the children's SSDI payments. The trial court disregarded the plain language, statutory scheme and legislative intent of Utah Code Ann. §78-45-7.5 (8)(b), by denying the credit. It is clear that the legislature intended that such children's Social Security payments should be credited toward the earning parent's child support obligation.

Point II. THE TRIAL COURT FAILED TO FOLLOW THE PROCESS REQUIRED OF UTAH CODE §78-45-7.2 AND MADE INADEQUATE FINDINGS REGARDING LACK OF SUBSTANTIAL CHANGE OF CIRCUMSTANCES

Debra has cited many findings which reflect the court's opinion of Steven's efforts to work. However, while the court adequately supported its decision that Steven could work, it failed to make detailed findings regarding each parent's income and how those

incomes should be combined to determine base child support.

Debra argues that because the court did not find a permanent change of circumstances, such findings are not necessary, the prior order stands, and it need not go through the process required in §78-45-7.2.

> When presented with a petition to modify a child support order, the trial court may not simply rely upon a prior stipulation entered into by the parties and accepted by the court." Rather, the court must apply Utah Code §78-45-7.2, which allows modifications if a party is able to demonstrate that a substantial material change in circumstances has occurred between the entry of the divorce decree containing the support order and the filing of the modification petition.
>
> Diener v. Diener at 1180.

The trial court's finding of "no substantial change of circumstances" without going through the steps of identifying incomes and determining base child support under those current incomes is contrary to process required in §78-45-7.2. Diener v. Diener dictates that the process under former subsection 6 (now subsection 8) should be approached in the following manner:

> First, the court must determine the petitioner's present adjusted gross income, as well as the respondent's present adjusted gross income, and then combine those amounts creating a combined adjusted gross income amount. Second, the court must apply the Guidelines to the combined adjusted gross income figures, see Utah Code Ann. §78-45-7.14 (2002), to determine the amount that has been established as the presumptive support amount for the identified adjusted gross income level of the parties. Third, the court must determine proportionality, or what portion of the presumptive child support amount is attributable to the petitioner pursuant to Utah Code section 78-45-7.7. Finally, the court must determine whether the petitioner's current obligation, as set by a pre-existing court order, is within ten percent (10%) of the presumptive figure arrived at through the modification petition. If there is a variance greater than 10%, the statute directs that "the court shall adjust the amount to that which is provided for in the guidelines." Utah Code Ann. § 78-45-7.2(6)(b).

Diener v. Diener at 1182.

Under the current §78-45-7.2 (8)(a) "the court shall, taking into account the best interest of the child, determine whether there is a difference between the amount ordered and the amount that would be required under the guidelines." The court is then to determine whether "there is a difference of 10 % or more and the difference not of a temporary nature." At that point, the court "shall adjust the amount to that which is provided for in the guidelines." §78-45-7.2 (8)(a). The present findings do not show that the court has gone through this process. The court eluded the necessary steps, particularly where Debra's income was concerned.

A modification under §78-45-7.2 (9)(a) permits a court to consider whether a substantial change of circumstances has occurred prior to calculating the base support figures to justify a modification. The child support act lists six factors which are to be considered in determining whether a substantial change has occurred. They are not exclusive, but serve as guidelines. Boyce V. Gobel 2000 UT Ap 237, 8 P.3d 1042, fn 4 & 5. Accordingly, if the court had properly considered Debra's actual earnings, and the absence of any need for her to care for young children in the home, certain factors listed as relevant in subsection (9)(b), i.e. (iv) material changes of 30% or more in the income of a parent, and (iv) material changes in the ability of a parent to earn, would have come into play.

Although Debra argues that Steven did not specifically request a review under section 8(a) The Petition to Modify included an implicit request to modify under either applicable statute, as it had been greater than three years and Steven asked the court to

reevaluate Debra's income. (R48) Steven's petition was sufficient to alert Debra and the court that he believed her income had changed and should be considered in the modification. In fact it is rarely possible to determine the opposing party's actual income prior to initiating a petition to modify a divorce decree, and entering into discovery regarding both parties' incomes.

Both parties provided evidence regarding Debra's current income and ability to earn. (T209, 224-5, 232, 233, & 240) Debra's earnings were certainly an issue at trial. The evidence was unrefuted that Debra was working and the argument that she should have some income attributed to her was unopposed. (T240) Therefore, the court went beyond its discretionary boundaries by omitting a finding on Debra's income, and by finding that it was "obviously anticipated that Debra would have to work to support herself and the children." (R509)

Debra argues that the original trial court anticipated that Debra would begin working and that she and the children would have needs beyond the child support amount. This argument is not supported by the Decree or facts of this case. In fact, Debra's remarriage immediately after entry of the decree demonstrates that she voluntarily relinquished alimony and may not have planned on working. Debra's argument implies that Steven should continue to be responsible for Debra's needs after her remarriage. Once Steven's obligation to provide Debra alimony was extinguished, Debra's needs should not have been a factor in the court's current child support decisions.

When explaining the outcome of a modification petition, the court must

> make findings on all material issues, and its failure to delineate what circumstances have changed and why these changes support the modification made [to] the prior divorce decree constitutes reversible error unless the facts in the record are clear, uncontroverted and only support the judgment.
>
> Diener v. Diener at 1181

The court failed to make the required findings here and the issue should be remanded.

Point III. THE CHILD SUPPORT JUDGMENT DOES NOT CORRESPOND WITH THE EVIDENCE IN THE RECORD OR THE COURT'S ORDER REGARDING CHILD SUPPORT ARREARAGE AND THE FINDINGS ARE INSUFFICIENT TO DETERMINE THE COURT'S METHOD AND PROCESS OF CALCULATION

Debra has cited a number of reasons the court did not rule in Steven's favor on his requested reduction of child support. (Appellee's Brief 12, 15, 22) Steven did not challenge the findings indicating the court's reasoning for refusing to find Steven disabled for child support purposes. However, the findings regarding the actual judgment ordered should be limited to an accounting of what child support was owed, what payments were credited and what balance remained. The Court's disdain for Steven should not impact the calculation of support owed. Debra never challenged the accuracy of Steven's records of actual cash payments. The Court's opinion of Steven's ability to work should not be a factor in calculating the amount of child support owed, and the resulting judgment. Petitioner's Exhibits P2 through 7 totaling what Debra claimed was owed at the beginning of trial does not match the final judgment amount. The summarization of arrearage was not done in a manner that can be followed. The judge's directions were vague as he stated :

> All unpaid child support amounts prior to October 1, 2001, and if the $20.00 per month has not been paid, they are owing and may be reduced to a judgment. . ..
>
> From September 1, 2004, the child support payable will return to the amount of $884.00 per month. Steven may deduct up to three months future payments from his child support obligation for money paid to the children by SSDI. . .
>
> because there were some additional periods SSDI paid for the children before this court started crediting him, no interest on delinquent child support prior to October 2001 shall be awarded to Debra.

(R515-16)

The resulting findings that "Based on the evidence the Court determines that there is an arrearage in child support due to the Petitioner in the amount of $17,377.74" (R516), are not sufficient to explain the mathematical calculations performed by Debra in computing the final sum.

The evidence supporting the final findings is absent from this record. The court failed to calculate the actual arrearage, ordering Petitioner's attorney to draft the findings of fact and order. (R462) Debra could have easily included her final worksheets or calculations in the findings so that they could be followed and double checked. Debra's prior counsel who calculated the arrearage instead of the court, has withdrawn without providing these figures.

When both parties asked for a hearing on Steven's various objections, the court's unexpected denial prevented the issue from being argued below. Respondent's objection to the Findings of Facts and Conclusions of Law should have been sufficient to trigger a hearing. Additionally a detailed objection was not

required to maintain an appeal under Utah Rules of Civil Procedure Rule 52.

Debra provided very little actual evidence as to what child support was owed. This is described in Appellant's brief page 36-37. Debra's child support arrearage worksheets, Exhibits P2-7, were prepared prior to trial. Debra relies on this as the evidence supporting the judgment. (Appellee's Brief 25) The court's memorandum order did not correspond precisely with Petitioner's proposed judgment or Respondent's proposed judgment for arrearage. Petitioner's proposed judgment included application of interest. The court denied interest as "there were some additional periods Petitioner received SSDI payments before the court started crediting him . . . " (R516)

There is no document or explanation in the court file corresponding with the amount of the final judgment. Petitioner's written closing arguments are inexplicably missing from the court file, and it is not possible to determine whether the court relied on these. Nonetheless, if Petitioner's Exhibit P2-7, or her closing argument exhibit ® 412-414) was the basis for the judgment, it is clearly in error because, Petitioner included interest from April 1999 forward, failed to assess the $20 per month from October 1, 2001 through date of judgment and also failed to account for the Social Security Disability payments from October 1, 2001 through the effective date of judgment. (R412 - 414.) [2]

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[2]It is unclear why the court chose October 1, 2001 as the date for temporary reduction of child support, when the prior temporary orders had set August 1, 2001 as the date.

Point IV. STEVEN DID NOT PURSUE AN APPEAL ON MEDICAL EXPENSES AND IT IS UNNECESSARY TO DISMISS THIS ISSUE

Debra is correct that the issue of unreimbursed medical expense was listed in the Notice of Appeal. Although mentioned in the Notice of Appeal, Respondent later determined not to develop that argument. It is not necessary to dismiss the issue or make a ruling on it as it was not briefed or argued.

Point V. ATTORNEY FEES SHOULD BE RECONSIDERED OR AWARDED IF THE TRIAL COURT HAS ERRED OR ABUSED ITS DISCRETION

Steven's request for reconsideration of attorney fees should be considered. An appeal is properly raised if a notice of appeal "'designate[s] the judgment or order, or part thereof, appealed from.'" In re B.B., 2002 UT App 82,¶9, 45 P.3d 527. Although Steven did not specifically list the issue of attorney fees in his Notice of Appeal, he stated that he "appealed "the Order Dismissing Petition to Modify Decree of Divorce and Judgment of the Honorable Roger S. Dutson entered in this matter on April 18, 2005 in the Second District Court, Weber County, State of Utah." This language was sufficient to put Debra on notice of the judgment and order which was being appealed.

"Despite the apparent rigidity of rule 3(d) of the Utah Rules of Appellate Procedure, "[n]otices of appeal are to be liberally construed." In re B.B., 2002 UT App 82 at ¶9 (alteration in original) (quotations and citations omitted).

In In Re B.B. the notice of appeal failed to cite attorney fees as an issue on appeal. The court concluded that "although the notice provided was "not ideal," it

was sufficient to notify the parties of the orders being appealed. Id. Other appellate cases have granted leniency regarding adequacy of Notice of Appeal. These include: Scudder v. Kennecott Copper Corp., 886 P.2d 48, 49-50 (Utah 1994) (holding notice of appeal which failed to designate that appeal was being taken from summary judgment as well as from final judgment was adequate because "'[t]here [wa]s no requirement that the notice designate intermediate orders which [were] to be raised as issues on appeal'"; U.P.C., Inc. v. R.O.A. Gen., Inc., 1999 UT App 303,¶¶26-27, 990 P.2d 945 (holding appeal from final order denying motion entitled "Motion to Revise Order and Judgment Dismissing Plaintiff's Complaint" encompassed appeal from summary judgment although appellant did not identify summary judgment in notice of appeal. State v. Valdovinos 2003 UT App 432, 82 P.2d 1163.

The Notice of Appeal certainly put Debra on notice that the final order and judgment would be challenged. Furthermore, Debra has not demonstrated that she is disadvantaged by including that issue and she has had ample opportunity to respond to this request.

Steven's request is based on whether this court should overturn or remand the trial court's decision. The trial court held Steven responsible for "causing most of the attorney fees and expenses incurred" even though it initially found merit in his requests and granted temporary modifications. (R462) Debra argues that because Steven engaged in dilatory behavior, attorney fees should be upheld.

However, as explained previously, supra page 6 many of the delays were not caused by Steven and were beyond his control. Steven should not have been construed to be causing problems of delay under those circumstances. If these factors influenced the court's ruling on the legal decisions or performance of the statutory procedures, Steven would be entitled to reconsideration of the allocation of fees. If the trial court has misapplied the law, or abused its discretion, equity would call for the ruling on attorney fees be overturned.

CONCLUSION

The trial court did not properly follow the governing statutes which determine how Social Security payments should be applied, how child support should be calculated and how judgments should be reached. The court, instead made decisions which were contrary to the statutes and skipped some processes which are required by the statutes. Therefore, the appellate court should take the following actions:

1. This court should overrule the trial court's decision that the children's social security payments would not be credited against Steven's child support obligation because it is contrary to the statutory mandate and the legislature's intent.

2. The Court should vacate the dismissal of the Petition to Modify, remanding the matter for proper analysis under Utah Code §78-45-7.2, and

considering both parties incomes.

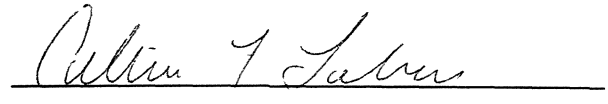
3. The court should remand the matter for further detailed findings on the child support arrearage, so that it can be determined whether the judgment properly reflects the court's specific rulings.

4. The Court need not make a ruling on the unreimbursed medical costs, as it was not briefed or argued.

5. The court should revise the attorney fees award if it finds that the trial court has misapplied the law or abused its discretion.

6. The court should grant Steven attorney fees if he is successful on appeal.

Respectfully submitted this 13 day of January 2006,



CATHERINE F. LABATTE
ATTORNEY FOR APPELLANT/RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that I served the reply of appellant, herein upon the opposing party by placing two true and correct copies thereof in an envelope and causing the same to be mailed, first class, postage prepaid on the 13 of January, 2006 to the following:

Catherine S. Conklin
Farr, Kaufman, Sullivan, Jensen
Medsker, Conklin, Olds & Nichols
Attorneys for Petitioner/Appellee
205 26th Street, Suite 34
Ogden, UT 84401

Catherine F. Labatte

CATHERINE F. LABATTE
ATTORNEY FOR APPELLANT/RESPONDENT